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QUESTION PRESENTED

Whether a public figure in a libel case could establish actual malice merely by proving that he did not say particular words attributed to him, without showing any material change in meaning from words that he admittedly said.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1799

JEFFREY M. MASSON,

Petitioner,

v.

THE NEW YORKER MAGAZINE, INC., ALFRED A. KNOPF, INC., and JANET MALCOLM,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENTS

STATEMENT

This case involves a claim by petitioner Jeffrey Masson that he was defamed by certain quotations attributed to him in an article written by respondent Janet Malcolm. The article was published in two parts by respondent The New Yorker Magazine, Inc., in 1983 ("Annals of Scholarship: Trouble in the Archives") and republished in book form by Alfred A. Knopf, Inc., in 1984 (*In the Freud Archives*). The district court granted summary judgment for respondents, concluding, *inter alia*, that petitioner, a public figure, had not presented clear and convincing evidence of actual malice. The court of appeals, with one judge dissenting, affirmed.

1. *The Work at Issue.* The issues in this case revolve around a small number of quotations from *In the Freud*

Archives.[1] The primary focus of the book is petitioner Jeffrey Masson, who, as a young Sanskrit scholar, chose to undergo training as a psychoanalyst throughout the 1970s. Late in that process, after Masson had begun contributing to psychoanalytic scholarship, he became acquainted with Kurt Eissler, a preeminent analyst and, at that time, the head of the Sigmund Freud Archives, a repository of materials of scholarly interest by and about Freud. By 1980, Masson had been hired by the Archives, as Projects Director, to undertake research concerning the life and work of Freud. In 1981, he was dismissed from that position. He went on to become a highly vocal and visible critic of psychoanalysis.

The book describes and analyzes Masson's rise and fall in the Archives. It sets forth how Masson came to challenge a crucial step in Freud's early thinking (his rejection of the "seduction theory"),[2] a step that opened the door both to the idea of childhood sexuality and to the method of analysis characteristic of the new discipline. Masson publicly talked about aspects of his challenge during his tenure as Projects Director of the Archives. Shortly after Masson delivered a paper at a psychoanalytic meeting in New Haven, his views were discussed at length in two articles published in *The New York Times*. Those articles, in turn, created a controversy among psychoanalysts, alienated Masson from Dr. Eissler and from Anna Freud (daughter of Sigmund and a prominent analyst in her own right), and ultimately led to his dismissal from the Archives. The dismissal, too, was reported in *The New York Times*.

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[1] Because the article and the book are essentially identical, we will refer to the work in its book form. We are lodging 20 copies of the book with the Clerk of the Court.

[2] In essence, Freud rejected the theory that childhood sexual abuse was the cause of all (as opposed to some) adult mental illness, concluding that emotion-laden adult "memories" of childhood must be examined with skepticism in order to separate what was real from what has been imagined. *See* P. Gay, *Freud: A Life for Our Time* 90-96 (1988).

In the Freud Archives is approximately 160 pages long. It includes literally dozens of pages of quotations from petitioner, including uninterrupted quotations of several pages at a time.

2. *The Preparation of the Work.* Janet Malcolm is a frequent contributor to *The New Yorker*. She had first written about psychoanalysis in a piece entitled "The Impossible Profession," which was published in the magazine and subsequently as a book by Knopf with the same title. Because of her interest in psychoanalysis, she had read about the Masson controversy and, a year later, decided to contact Masson about the possibility of a *New Yorker* piece on that subject. J.A. 47. Masson welcomed the idea. J.A. 47, 63.

Over a period of approximately seven months, Masson and Malcolm met a number of times in California and New York. They also spoke by telephone. Many of their conversations were recorded on tape. (The tape recordings run to more than 40 hours.) During the meetings, Masson invited discussion of all aspects of his life and work,[3] and disclosed many personal details.[4]

Some of the conversations were not recorded. For example, Malcolm did not tape her talks with Masson during his visit to New York in May 1983, when he was a guest at her home. Malcolm did make notes, however, of those and other conversations. J.A. 48, 52-53, 112-15, 239.[5]

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[3] *See* J.A. 229 ("One . . . doesn't want to avoid either the personal side about me and my whole life nor the side connected with my discoveries. . . . [T]here is no reason to stay away from anything, really.")

[4] *See* J.A. 128-32 (Masson describing on tape his sexual activities).

[5] As we discuss at pages 31-32, *infra*, petitioner has contested the authenticity of the notes of the conversations in New York.

Malcolm wrote the work in the spring and summer of 1983, using both the tapes and her notes.[6] The New Yorker published the articles in December of that year, and Knopf published the book in May 1984. The tapes and the notes provided the basis for the quotes attributed to petitioner in the work.

3. *The District Court Proceedings.* Masson brought suit against respondents in November 1984, claiming that certain quotations attributed to him in the book had defamed him and invaded his privacy. J.A. 254-67. Although the complaint made allegations about alteration of quotations, petitioner also asserted that one quotation had been misleadingly edited. J.A. 259-60. This initial complaint—the first of five filed by petitioner—made no mention of seven out of the 11 quotations ultimately contested by petitioner.

Petitioner did challenge, however, a number of quotations that have passed out of the case. For example, asserting that each seriously injured his reputation, Masson expressly denied having said that " 'analysis stands or falls with me now' " (J.A. 260); that analysts " 'sensed that I could single-handedly bring down the whole business and, let's face it, there's a lot of money in the business. And they were right to be frightened, because what I was discovering was dynamite' " (J.A. 260); and that there were " 'hundreds of articles on the positive effects of sexual seduction' " (J.A. 260). Masson's denials notwithstanding, each of those quotations appears on the tape recordings. *Compare* J.A. 259-60 (Complaint ¶¶ 15(b), (e), (i)) *with* J.A. 143, 137 *and* Clerk's Record 65, Exh., transcript of tape 6, at 31. Masson eventually withdrew this complaint.

[6] Malcolm also used notes and tapes of interviews with more than a dozen people who had known petitioner personally and professionally. J.A. 48.

In his Second Amended Complaint,[7] petitioner dropped his challenge to a number of quotations, including the ones discussed above, but elected to object to two more. Again asserting injury to his reputation, he denied saying that he would postpone his resignation from the International Psychoanalytic Association " 'until I can get the most effect out of it' "; he further denied saying that he had told Dr. Eissler, in response to a request, that he was " 'not going to give . . . back' " some original letters of Sigmund Freud. Those quotations, too, appear on the tape recordings. The district court dismissed these claims on the ground that petitioner had shown no falsity. *See* Pet. App. C9.[8]

After obtaining the recordings of his conversations with Malcolm, Masson filed a Fourth Amended Complaint, adding allegations about five previously unmentioned misquotations. Respondents then sought summary judgment with regard to all of the claimed misquotations in this complaint, both old and new. As to all of the alleged misquotations, respondents argued, *inter alia*, that the evidence was insufficient to allow a reasonable jury to find, by clear and convincing evidence, that any defamatory falsehoods were published with actual malice.

The district court granted the motion. Noting the absence of any direct evidence of actual malice, the court rejected the argument that "the requisite malice can be inferred simply based upon the alleged literal inaccuracy of the [illegible] or the fact that Masson did not actually

[7] A First Amended Complaint alleged no particular misquotations. The district court dismissed it for lack of specificity.

The allegations of the Second Amended Complaint were carried forward in a Third Amended Complaint, which did not add or withdraw any allegations about specific quotations. It differed from the Second Amended Complaint only by the addition of allegations regarding special damages, as required by the district court.

[8] The district court dismissed several other claims on the same basis. Pet. App. C7-C14.

use the precise words that Malcolm attributed to him." Pet. App. B6. It held, instead, that petitioner could establish actual malice only if the *meaning* of the passages so differed from the meaning of his own words that the quotes would not constitute "rational interpretations" of the undisputed remarks.[9] (In making this comparison, the court looked only at statements by Masson on tape, without relying on the challenged notes of untaped conversations. Pet. App. B6 n.4.) Then, examining each of the relevant passages in turn, the court found no evidence sufficient to create an issue of actual malice for a jury.

The district court further held that The New Yorker and Knopf were entitled to summary judgment on the issue of actual malice. Saying that petitioner had based his claim against the magazine on a theory of vicarious liability, the court held that the claim failed because Malcolm was not liable. Pet. App. B27.[10] Furthermore, the court held that both The New Yorker and Knopf could reasonably rely on the work of a known and respected author. Pet. App. B27. Although Masson had made general objections to the accuracy of the work, the court concluded that this complaint was not enough on its own to establish actual knowledge of falsity or reckless disregard of the truth. Pet. App. B28.

4. *The Court of Appeals Ruling.* The court of appeals affirmed. Like the district court, the court of appeals rejected the proposition, urged by petitioner, that "a jury could find actual malice by clear and convincing evidence based solely on the evidence he presented showing that Malcolm had deliberately 'fabricat[ed] quota-

[9] Pet. App. B6-B7 (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512-13 (1984), and *Time, Inc. v. Pape*, 401 U.S. 279, 285-86, 290 (1971)).

[10] The court therefore did not reach the issue whether Malcolm was an employee of the magazine, a necessary predicate for any vicarious liability. Petitioner did not seek to impose vicarious liability on Knopf.

tions ascribed to him.'" Pet. App. A5. The court concluded that knowledge of a difference in words—even assuming such knowledge existed—would not be enough. Rather, the court held that actual malice could not be inferred if the changes in words did not "'alter the substantive content'" of the original words or were "'"rational interpretations"'" of those words. *See* Pet. App. A11 (quoting *Hotchner v. Castillo-Puche*, 551 F.2d 910, 914 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977), *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984), and *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971)).

The court then applied this standard to each of the alleged misquotations. Beginning with the nine quotations alleged by petitioner to have been "altered" or "fabricated," the court of appeals found no change in substantive content (from what Masson admits to saying) with respect to eight of the nine.[11] Those eight include all five of the allegedly altered quotes still being challenged by petitioner in this Court.[12] Then, turning to the two quotations said to have been misleadingly edited, the court held that the editorial decisions made by Malcolm reflected rational interpretations of Masson's statements and thus did not demonstrate actual malice on her part.[13]

[11] Like the district court, the court of appeals did not rely on the notes from which some of the contested quotes were actually drawn. It made comparisons only with undisputed statements by Masson on the tapes.

[12] Pet. App. A11-A24. In some cases, the court simultaneously endorsed the district court's conclusion that the passages constituted "rational interpretations" of ambiguous remarks. The only passage analyzed solely under the "rational interpretation" standard was the one in which Masson asserts that "'Eissler would have admitted . . . [I] was right'" about the significance of a particular discovery Masson made. *See* Pet. App. A22-A23. That quote is not at issue in this Court.

[13] Pet. App. A26-A29. Only one of the two passages is included in petitioner's arguments in this Court.

The court noted alternative grounds for its rulings on two of the disputed quotations. Having found no actual malice regarding the "intellectual gigolo" quotation, the court went on to state, first, that "the 'intellectual gigolo' quotation is not defamatory" and, second, that it "is non-defamatory under the 'incremental harm branch' of the 'libel proof' doctrine." Pet. App. A15. Moreover, in reviewing the quotation about "sex, women, fun," the court took note that the district court had found the passage to be " 'substantially true because the sting of the passage is the same as that of undisputed tape-recorded passages.' " Pet. App. A17 (quoting Pet. App. B22). *See also* Pet. App. C7-C8. In concluding that the quotation is "consistent with" other statements made by petitioner, the court of appeals appears to have approved the holding of the district court with respect to substantial truth, while also relying on it as a basis for finding a lack of evidence of actual malice.[14]

Judge Kozinski dissented. His disagreement with the majority rested on two principal grounds. To begin with, he argued that many of the challenged quotations were significantly different in content and/or tone from unchallenged statements of Masson on the tapes. He regarded those differences as sufficient to allow the inference that Malcolm used fictionalized quotations "to paint an image materially different from what Masson's own words would have conveyed." Pet. App. A49.

Judge Kozinski also proposed a different legal standard. Under his analysis, a statement in quotation marks would be subject to a five-part inquiry. Pet. App. A69. He argued that a statement should be actionable if it purports to represent the speaker's actual words; the statement is inaccurate; the inaccuracy goes beyond an "immaterial" or "cosmetic" change; the inaccuracy conveys a defamatory impression of the speaker; and the defendant was aware of the inaccuracy or acted with "reckless disregard" of a possible inaccuracy. Pet. App. A69-A82. Applying that test, Judge Kozinski found sufficient evidence with regard to each of the respondents to justify submitting the issue of actual malice to a jury. Pet. App. A80-A88.

[14] The court also found no liability on the part of The New Yorker and Knopf, stating: "Because we have concluded that Masson failed to present evidence sufficient to support a reasonable jury finding that Malcolm acted maliciously, the district court did not err in holding that The New Yorker and Knopf cannot be held liable for publishing the article and book." Pet. App. A30.

Masson filed a petition for rehearing with a suggestion of rehearing *en banc*. The petition was denied on February 15, 1990. This Court granted certiorari on October 1, 1990.

SUMMARY OF ARGUMENT

A public figure, like petitioner, "may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). In this case, petitioner—who claims that he was misquoted—argues that he can prove "knowledge of falsity" (*i.e.*, actual malice) merely by presenting "objective evidence that [the author] attributed words to [him] that he did not say." Pet. Br. 43. But petitioner has misunderstood the concept of falsity as it relates to libel law in general and to actual malice in particular: what he must prove is not just knowledge of some change of *words*, but knowledge of a material change of *meaning*. Petitioner cannot meet that burden.

I.

The idea that falsity (and, in turn, knowledge of falsity) can rest upon a difference in words alone is foreign to the principles of libel law. A plaintiff in a libel case must show, not just falsity in an abstract or technical sense, but falsity that affects the understanding of those reading the publication. The essential inquiry is "whether the [alleged] libel as published would have a

different effect on the mind of the reader from that which the pleaded truth would have produced." R. Sack, *Libel, Slander, and Related Problems* 138 (1980) (internal quotations omitted).

This requirement follows naturally from the fact that, in libel law, "the interest protected is that of reputation." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Torts* 797 (5th ed. 1984). Indeed, this Court has recognized that it is the interest in protecting reputation that allows states, notwithstanding the First Amendment, to impose liability for knowing falsity. *Gertz v. Robert Welch*, 418 U.S. at 341. A misquotation without a genuine change in meaning, however, does not infringe any legitimate interest in protecting reputation; at most, it presents a concern about journalistic practices. A state, even if it wished to do so, could not regulate those practices for their own sake. *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678, 2685 (1989).

The position advanced by petitioner would also create an unsound distinction between the law applied to quotations and the law applied to other ways of presenting what people have said. This case narrowly concerns quotations that in most instances reflect only minor word changes from, and in all instances convey the same meaning as, what petitioner admits to saying in the interviews with respondent Malcolm. If the words to which petitioner objects had been contained in a paraphrase of his statements, petitioner could not demonstrate actual malice without showing that the author knew of (or recklessly disregarded) a difference in meaning. Yet no greater injury to reputation is caused by a quotation than by a paraphrase, as long as any departure from exact reproduction of the spoken words does not materially change the meaning.

The breathing space provided by the First Amendment is needed for quotations, just as for other means of presenting speech. As this Court has observed, "[a]ny

departure from full direct quotation of the words of [a person interviewed], with all its qualifying language, inevitably confronts the publisher with a set of choices." *Time, Inc. v. Pape*, 401 U.S. 279, 286 (1971). Were this Court to allow liability for deviations from verbatim quotation, regardless of whether the author knew of any change in substance, it would seriously affect the ability of writers to write, and readers to read, a clear text. There is no reason to impose those restrictions on the press in the absence of any damage to reputation.

II.

Petitioner not only must prove actual malice, properly defined, but he must do so with "convincing clarity." *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511 & n.30 (1984). To withstand a motion for summary judgment, he must present "affirmative" and "concrete" evidence sufficient to meet that heightened standard of proof. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 256-57 (1986).

Petitioner has no such evidence. To begin with, he has produced no evidence directly showing that respondents knew or were made aware of any distortion of the meaning of what he said. He thus is forced to rely on differences in the words themselves to establish that respondents must have had such knowledge. But, as both courts below correctly recognized, the asserted differences fall far short of demonstrating that respondents knew of, or recklessly disregarded, any different meanings at the time of publication.

ARGUMENT

The basic principles applicable to libel cases are by now familiar. Although the First Amendment broadly protects speech concerning public figures, this Court has recognized that the states may impose liability for a limited class of defamatory falsehoods causing injury to reputation. For a public figure like petitioner to bring his case within that category, he must show not only that the statements were false and defamatory but also that they were published with "actual malice." *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The second element—that of subjective state-of-mind—requires that the plaintiff establish knowledge of falsity on the part of the author (and publisher) or at least a "high degree of awareness of [the statements'] probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). More pointedly, the plaintiff must demonstrate that the author (and publisher) "in fact entertained serious doubts as to the truth of [their] publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). *See Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678, 2696 (1989). That showing, moreover, must be made by clear and convincing evidence. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511 n.30 (1984). This Court has aptly described the burden imposed on a public figure as "substantial indeed." *Herbert v. Lando*, 441 U.S. 153, 174 (1979).

The court of appeals, in applying the actual malice standard to the alleged misquotations, required petitioner to show that respondents knew (or strongly suspected) that any departures from verbatim transcription changed the substantive content of the quoted statements. Petitioner attacks that focus on substance, urging this Court to hold that, in a case involving quotation of a public figure, "a jury could infer knowing falsity *solely* from the objective evidence that [the writer] attributed words to [the public figure] that he did not say." Pet. Br. 43 (emphasis added). We think that idea is simply incorrect:

as we discuss below, to establish actual malice, a public figure must show, not merely knowledge of a difference in words, but knowledge of a difference in meaning that creates a false and defamatory impression. Petitioner cannot do so. Indeed, his remaining complaints about six particular quotations involve alleged word changes that are utterly insignificant under a standard properly concerned with knowing changes of meaning.

I. TO RECOVER IN LIBEL FOR ALLEGED MISQUOTATION OF HIS SPOKEN WORDS, A PUBLIC FIGURE MUST PROVE THAT THE CHALLENGED QUOTES WERE PUBLISHED WITH KNOWLEDGE OR STRONG SUSPICION THAT THEY DIFFERED IN DEFAMATORY MEANING FROM THE SPOKEN WORDS.

To understand what is required to prove "knowledge of falsity," it is necessary to consider just what "falsity" means in the law of defamation. Petitioner seeks to argue that knowledge of falsity—and, hence, actual malice itself—can be proved by showing simply that the author (or publisher) knew (or strongly suspected) that the published quotes were not verbatim. *E.g.*, Pet. Br. 26, 35, 43-44.[15] That view is insupportable for at least two related reasons. First, it disregards the fact that the falsity necessary to sustain a libel case—and thus, logically, the falsity of which there must be knowledge—involves a distortion of meaning, not just a variation in words. Only a

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[15] Petitioner states: "By placing quotation marks around Masson's words, Malcolm was falsely stating to her readers that he had actually uttered those words . . . . Since Malcolm conducted the interviews and had the tapes, she knew that Masson never made the statements she was attributing to him, and so published with knowing or reckless falsity." Pet. Br. 43-44. *See also* Pet. Br. 26 ("Since Malcolm attended the interviews and had possession of the tapes, she necessarily knew that the quotes she was attributing to Masson were false; i.e., she knew that Masson did not say, 'I was like an intellectual gigolo.'"); *id.* at 33 (Malcolm "faced no choices in quoting Masson verbatim" because she had tape recordings).

difference in meaning, not a difference in words alone, can result in an injury to reputation, the interest that justifies allowing damages against the press in libel actions. Second, it leads to irrational distinctions in the law of malice applicable to different forms of presenting information—distinguishing, for example, between quotations (in which knowing differences in words would be en[illegible]) and paraphrases (in which knowing differences i[illegible]aning would be required). Because the potential ef[illegible] on reputation is essentially the same in both cases, and because the underlying First Amendment interests are the same as well, the Court should give the same protection, no more and no less, to both types of speech.

A. The Concept of Falsity in Libel Law Depends Upon a Difference in Meaning as Understood by the Reader and the Resulting Effect on Reputation.

1. *The Understanding of Meaning.* The first problem with petitioner's construction of "falsity" as concerned with differences in language, rather than with differences in meaning, is that it detaches the concept of falsity from the very essence of his libel action. A plaintiff in a libel action—whether claiming misquotations or not—must show that the alleged false statements injure him in the eyes of those who read or learn the contents of the publication.[16] This concern about the effect on others is the reason for the requirement that the alleged libel have been published to at least one third party. W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Torts* 773-74 (5th ed. 1984) ("*Prosser & Keeton*"); Cal. Civ. Code § 45 (Deering Supp. 1990) (requiring "publication"); Restatement (Second) of Torts §§ 558, 577. What is crucial, therefore, is "whether the [alleged] libel as published would have a different effect on the mind of the

[16] *See* Cal. Civ. Code § 45 (Deering Supp. 1990) (libel must expose plaintiff "to hatred, contempt, ridicule, or obloquy" or "cause[] him to be shunned or avoided" or have "a tendency to injure him in his occupation"); Restatement (Second) of Torts § 559.

reader from that which the pleaded truth would have produced." R. Sack, *Libel, Slander, and Related Problems* 138 (1980); *Hayward v. Watsonville Register-Pajaronian & Sun*, 265 Cal. App. 2d 255, 262, 71 Cal. Rptr. 295, 300 (1st Dist. 1968); *Gomba v. McLaughlin*, 180 Colo. 232, 504 P.2d 337, 339 (1972).

Libel law, in California and elsewhere, accordingly focuses on the substance of the understanding conveyed to a reader rather than on particular words: "The form of the statement is not important, so long as the defamatory meaning is conveyed . . . ." *Prosser & Keeton* at 776. That is why defamatory implications may be actionable. *See id.* at 780 ("The form of the language used is not controlling, and there may be defamation by means of a question, an indirect insinuation, an expression of belief or opinion, or sarcasm or irony.") (footnotes omitted); Restatement (Second) of Torts § 563 Comment c; *cf. Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2706 (1990). The same focus is also reflected in the principles that "[p]articular words must be read in the context of the entire communication" (R. Sack, *supra*, at 52);[17] that "[t]he literal 'truth' of a publication need not be established, only that the statement is 'substantially true'" (*id.* at 137); and that "[t]he proof of 'truth' must go to the 'gist' or 'sting' of the defamation" (*ibid.*, citing *Maheu v. Hughes Tool Co.*, 569 F.2d 459 (9th Cir. 1977)). *See Alioto v. Cowles Communications, Inc.*, 623 F.2d 616, 619 (9th Cir. 1980) (under California law, there is no liability if the challenged statement, "although not literally true in every detail, is substantially true in its implica-

[17] *See Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 261, 721 P.2d 87, 91, 228 Cal. Rptr. 206, 209-10 (1986), *cert. denied*, 479 U.S. 1032 (1987) (publication must be "read as a whole"); *Prosser & Keeton* at 782 ("[A]n entire writing . . . must be construed as a whole. The plaintiff may not lift words out of their context, and the defamation contained in one line may be negatived or explained away by what appears elsewhere.") (footnotes omitted).

tion, that is, that the 'gist' or 'sting' of the article, read as a whole, is true"), *cert. denied*, 449 U.S. 1102 (1981).[18]

It is thus a falsity of substance, not a falsity of words used to convey that substance, that matters in libel law, and there is every reason to maintain that focus when the issue is knowledge of falsity in a quotation case. For example, in *Hotchner v. Castillo-Puche*, 551 F.2d at 914, the Second Circuit found a lack of actual malice—despite the fact that the publisher had deliberately altered a quotation by Ernest Hemingway about the plaintiff—on the ground that "the change did not increase the defamatory impact or alter the substantive content of [the quotation]." The court reasoned that if the publisher "could not have been liable for publishing the uncut [*i.e.*, original] version, it cannot be liable for deciding to make the passage less offensive to [the plaintiff]." *Ibid.* Put another way, the Second Circuit correctly recognized that even knowing changes in language should not result in a loss of First Amendment protection as long as the publisher had no reason to know that the meaning conveyed as a result of the change was any different.[19]

Although *Hotchner* involved a quotation by a third party about the plaintiff, its general reasoning applies as well to the present case, involving statements of the plaintiff himself. In this situation, either or both of two injuriously false meanings may be conveyed to readers. One is the substance of what the plaintiff said about himself—for example, that he committed a particular bad act.[20] The second is the impression to be drawn sim-

[18] *See Jennings v. Telegram-Tribune Co.*, 164 Cal. App. 3d 119, 126, 210 Cal. Rptr. 485, 488 (4th Dist. 1985) ("It is well settled that a defendant is not required in an action of libel to justify every word of the alleged defamatory matter; it is sufficient if the substance, the gist, the sting of the libelous charge be justified.") (internal quotation omitted), *language quoted with approval* in *Reader's Digest Ass'n v. Marin County Superior Court*, 37 Cal. 3d 244, 262 n.13, 690 P.2d 610, 621 n.13, 208 Cal. Rptr. 137, 148 n.13 (1984), *cert. denied*, 478 U.S. 1009 (1986); *Emde v. San Joaquin County Central Labor Council*, 23 Cal. 2d 146, 160, 143 P.2d 20, 28 (1943); *Kurata v. Los Angeles News Publishing Co.*, 4 Cal. App. 2d 224, 227-28, 40 P.2d 520, 522 (2d Dist. 1935).

Liability cannot be imposed based simply on the use of colorful language. Thus, in *Jennings*, the court held that a newspaper could not be held liable for using the terms "tax fraud" and "tax evasion" to describe a no-contest plea to the federal misdemeanor of failing to file tax returns. Examining the "gist" or "sting" of the articles as the "'average reader of [the newspaper] would reasonably interpret the articles'" (164 Cal. App. 3d at 127, 210 Cal. Rptr. at 489, quoting *Kilgore v. Younger*, 30 Cal. 3d 770, 777, 640 P.2d 793, 797, 180 Cal. Rptr. 657, 661 (1982)), the court concluded: "'Tax fraud' and 'tax evasion' are harsh terms; but we cannot say the average reader would have viewed the offenses differently . . . had less colorful descriptions been chosen." *Ibid.* *See also Greenbelt Coop. Publishing Ass'n Inc. v. Bresler*, 398 U.S. 6 (1970) (charge of "blackmail" not actionable where reasonable reader would not have understood it to charge criminal offense).

[19] By contrast, the quotations at issue in *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (2d Dist.), *cert. denied*, 444 U.S. 984 (1979)—a case heavily relied on by petitioner (Pet. Br. 23, 44)— were completely different in both substance and tone from, and considerably more defamatory than, the words actually spoken by the plaintiff. We also note that this case—with a background of more than 40 hours of conversations between Masson and Malcolm—does not involve imaginary interviews or visits. *Compare Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974); *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976).

[20] Of the six statements that petitioner continues to challenge, five appear to fall in this category—that Anna Freud and Kurt Eissler viewed petitioner as "'an intellectual gigolo—you get your pleasure from him, but you don't take him out in public'" (J.A. 14); that petitioner would turn the Freud house into a place of "'sex, women, fun'" (J.A. 12); that petitioner said of his remark about the sterility of psychoanalysis in his otherwise-respectful paper delivered to analysts in New Haven, "'I don't know why I put it in'" (J.A. 15); that petitioner changed his middle name to "Moussaieff" because "'it sounded better'" (J.A. 13); and that petitioner stated, "'well, he had the wrong man,'" in response to Eissler's suggestion that petitioner do the honorable thing of remaining silent about his dismissal (J.A. 13). The fact that petitioner made those statements, although perhaps relevant to whether readers would believe them, is not itself defamatory. Any damage to reputation would occur, instead, because readers believe the state-

ply from the fact that the plaintiff said what he said—for example, that he was the best lawyer in the country.[21] Whereas the defamatory meaning of the latter depends on the fact that the plaintiff himself made the statement, the defamatory meaning of the former, of course, would be conveyed regardless of whether the plaintiff or a third party had made the statement (if the reader believed it). In either event, it is one of those two meanings that must underlie a public figure's complaint of knowing falsity.

To demonstrate the necessary falsity, then, the plaintiff complaining of misquotation must show that the statement, in at least one of those two ways, conveys a message that differs in meaning from, and is more disparaging than, the concededly true message conveyed by a verbatim quote. (The verbatim quote must be taken as true in a case like this because the plaintiff himself spoke the words and thereby attested to their truth.) If that showing of a difference in meaning cannot be made, nothing material is added by complaining that the plaintiff did not actually use particular words.[22] A reader

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ments themselves—just as if each statement had been credibly made by a third party. *See* Pet. Br. 6-13.

[21] Only one of the statements that petitioner still challenges clearly involves this sort of message—that eventually analysts will say of petitioner that "after Freud, he's the greatest analyst who ever lived." J.A. 135. Of course, petitioner does not complain that his reputation would be damaged if readers believed the statement. He complains only that readers view him as arrogant, grandiose, and egotistical for having ascribed such high stature to himself. J.A. 16 (complaint). *See* Pet. Br. 9.

[22] In some cases, perhaps, the attribution of particular words could be significant in a way that might or might not be described as dependent on the meaning of the utterance. *Cf. Bindrim v. Mitchell, supra* (quotation falsely ascribed abusive and vulgar language to plaintiff). The present case involves no such complaint. Thus, any harm caused by the "greatest analyst" statement would not depend upon the particular language of the statement. Petitioner's complaint on this score would be no different if, for example, the quote had petitioner proclaiming that other analysts would eventually view him as the "most important" or the "best" analyst after Freud.

who believes the attributes ascribed by a substantively equivalent, but differently worded, statement does not come to a different and worse view of the plaintiff because of word choice alone. In such circumstances, the purely linguistic "falsehood" is not false in the sense relevant to defamation law. *See Milkovich v. Lorain Journal Co.*, 110 S. Ct. at 2706 n.7 ("falsity relates to the *defamatory* facts implied by a statement").

In short, there is no such thing as a cause of action for mere misquotation. Libel law is not concerned with differences of language that make no meaningful difference to the defamatory understanding to be drawn by an average reader from the challenged publication. That is true of descriptions of what a person did, and it is equally true of representations about what a person said.

2. *The Impact on Reputation.* The theory advanced by petitioner not only detaches actual malice from the kind of falsity that is at the heart of libel actions, it also disconnects malice from the interest that gives rise to such actions in the first place. In libel law, "the interest protected is that of reputation." *Prosser & Keeton* at 797. *See Milkovich v. Lorain Journal Co.*, 110 S. Ct. at 2702 ("Since the latter half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements."); *Brown v. Kelly Broadcasting Co.*, 48 Cal. 3d 711, 743-46, 771 P.2d 406, 426-28, 257 Cal. Rptr. 708, 728-30 (1989). If there is no difference of substance between what a reader believes about the plaintiff based on the quotation and what the reader would believe based on a verbatim transcript, then reputation could not be harmed by the difference in language.

The interest in protecting reputation is not just a matter of state law; it is, at bottom, the sole interest that justifies sanctions on the press for knowing falsity. This Court has so recognized on a number of occasions. More than a decade ago, the Court stated flatly: "*The* legiti-

mate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 341 (emphasis added). In recent cases as well, while discussing the justification for allowing libel actions in certain circumstances, the Court has consistently identified only that one state interest as a legitimate ground for restricting freedom of speech. *See, e.g., Milkovich*, 110 S. Ct. at 2702, 2707-08; *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 773 (1986). When no injury to reputation is at issue, there is no good reason for the First Amendment to give way in defining the standards for liability, at least in an action specifically based on claims of defamation. As this Court has stated, it is "appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved." *Gertz*, 418 U.S. at 349.

Urging the Court to "discourage" journalists from changing quotations, petitioner apparently seeks to suggest that libel actions can serve to regulate journalistic standards for their own sake. Pet. Br. 22, 28. This Court has made clear, however, that even an extreme departure from journalistic norms cannot by itself justify liability. *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. at 2685. No state has a legitimate interest in permitting libel or other actions for the sole purpose of holding publications to perceived journalistic standards, let alone a legitimate interest in setting such standards. By definition, that would be content regulation of the purest form, condemned by the First Amendment. *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229-30 (1987); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984).

It would, as a practical matter, be of great constitutional concern if states were allowed to inquire into immaterial departures from verbatim quotation for the purpose of disciplining the press. Most obviously, such

inquiries would produce expensive and burdensome libel litigation, turning largely on the meaning and application of proper journalistic standards. The question of standards governing use of quotations is a perfect illustration. As petitioner's *amici* show in the journalism materials that they have lodged with this Court, there is well-recognized variation in accepted practices regarding—and perennial debate about—the limits of permissible word changes in quotations.[23] Many such issues are continually under active debate, with no clear resolution and no fixed rules. It would be utterly inappropriate to make libel suits into a forum for such debates, allowing states to condemn and punish one set of practices, particularly without any interest in individual reputation at stake.

It is also plain that, given the realities of journalism, costly litigation over misquotation could readily become a tool of harassment. Journalists regularly interview subjects without making a tape recording of the conversation; the demands of journalism, especially perhaps daily newspaper writing, make that practice a necessity. *See, e.g.*, J. Olen, *supra*, at 98, 100; J. Hulteng, *supra*, at 69.[24] But if the rule advanced by petitioner were

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[23] M. Charnley & B. Charnley, *Reporting* 248-50 (4th ed. 1979) (setting forth debate over departures from verbatim transcription, noting view that the standard is whether quote "gives the reader accurate meaning and flavor"); G. Hough, *News Writing* 270-71 (2d ed. 1980) (approving practice of deviating from verbatim transcription of oral speech); J. Hulteng, *The Messenger's Motives . . .* 69-72 (1976) (at 71: "[S]ome working conventions have been built into the journalist's ethic where quotations are concerned. Even if every syllable hasn't been captured as uttered, even if every article isn't exactly in place, the quote can still be considered an acceptably accurate one if it honestly reflects what the speaker said."); J. Olen, *Ethics in Journalism* 98-100 (1988) (noting practices and policies regarding "reconstruct[ing] quotes after interviews," "condensing statements, correcting grammar, and improving vocabulary").

[24] In this case, a good deal of discussion with petitioner took place during Malcolm's week-long visit in Berkeley—in cars, on

adopted, any subject of an unrecorded interview could, by simple assertion, engage in full-blown litigation over the literal fidelity of a resulting quote. (Denials of quoted statements are, of course, a common feature of public life. *See Harte-Hanks*, 109 S. Ct. at 2698 n.37.)[25] The predictable result would be to discourage publications from using quotations, at considerable cost to the ability of the press to write readable stories and, therefore, to First Amendment values. *See* pages 28-30, *infra*.

This case hardly provides a sound basis for a new rule authorizing judicial discipline of the press. Contrary to the caricature drawn by petitioner and the dissenting judge below, the court of appeals did not give writers "license to invent quotations on the basis of what they perceive to be a speaker's character." Pet. App. A46 (Kozinski, J., dissenting); Pet. Br. 29.[26] This

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walks, etc.—without being tape recorded. J.A. 237-38. And Malcolm's tape recorder was broken during petitioner's visit with her in New York. J.A. 59.

[25] This case provides a telling example. In his initial complaint, and then in several of his amended complaints, petitioner denied making at least five separate statements that, it turned out, were on the recordings. *See* pages 4-5, *supra*. Without the tape recordings, petitioner would doubtless be demanding a jury trial about those quotations as well.

[26] Petitioner's exaggeration of the ruling below shows why his reliance on the D.C. Circuit's opinion in *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563 (1984), *vacated and remanded on other grounds*, 477 U.S. 242 (1986), is misplaced. The present case does not involve the broad proposition rejected by the D.C. Circuit—"that the unchallenged portions of [the challenged] articles attribute to the [plaintiffs] characteristics so much worse than those attributed in the challenged portions, that the latter cannot conceivably do any incremental damage." *Id.* at 1568. As we note in the text, this case involves, at most, changes of words that preserve the specific meaning of the plaintiff's quoted statement. As to this situation, the only pertinent portion of *Liberty Lobby* actually supports our view. In a footnote, the court suggested that no liability could be imposed based on the "erroneous attribution of incremental evidence of a character flaw *of a particular type* which is

case narrowly concerns quotations that in most instances reflect only slight word changes from, and in all instances convey the same specific meaning as, what petitioner concededly did say in the interviews described. In other words, the case involves—and the ruling below extends no further than—quotations that would clearly be protected if the quotation marks were removed and the same thing were said in paraphrase. As we next discuss, no special set of rules of knowing falsity should distinguish paraphrases from quotations.

B. The First Amendment Prohibits the Imposition of Liability for Alleged Misquotations to the Same Extent as It Does for Other Alleged Misrepresentations of What the Plaintiff Said.

1. *The Impact of Speech.* Petitioner's position also makes an artificial, and ultimately pointless, distinction between the law applicable to quotations and the law applicable to other means of conveying what people say and mean. Although petitioner attempts to treat quotations as a unique category of speech—expressly distinguishing quotations from paraphrases (Pet. Br. 24, 26)—the line is largely illusory. For instance, it is self-evident that a paraphrase may convey precisely the same defamatory message as a quote. There is no material difference, for purposes of libel law, between "He said, 'I am promiscuous'" (quotation) and "he said that he is promiscuous" (paraphrase) or, for that matter, any number of other statements communicating the same basic fact (*e.g.*, "he admitted that he is promiscuous"). It is hard to see why a plaintiff would be deterred from bringing (or should be denied the chance to bring) a libel action—if the attribution is knowingly false and

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in any event amply established by the facts." In that type of case (more akin to, though still far broader than, the present case), the court explained, "the essentially derogatory implication" of such an attribution is not false. 746 F.2d at 1568 n.6 (emphasis added).

defamatory—simply because the author omitted quotation marks. The impact of that omission would not be materially different in the only terms relevant to libel law: what readers believed about the plaintiff. Knowing falsity of a paraphrase would be judged by the statement's meaning—by the attribute ascribed to the plaintiff.

It would, quite literally, elevate form over substance to have a different inquiry for quotations. Just as the omission of quotation marks does not provide an absolute defense to liability, the use of quotation marks should not create liability that would otherwise not exist. A quotation, like a paraphrase, is a defamatory falsehood only insofar as it falsely ascribes a defamatory attribute to the plaintiff: whether it is a literal copy of his spoken words is itself legally insignificant. If the quotation and the original statement both convey the same defamatory meaning, then the change in words has done no more harm than a paraphrase would have done. In that case—which is essentially this case (*see* pages 35-46, *infra*)—no legitimate interest is served by policing the linguistic difference.[27]

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[27] Petitioner's distinction between paraphrase and quotation is wrong not only for its assumption about what readers understand about the absence of quotation marks but likewise for its assumption about what readers understand about the presence of quotation marks. Petitioner, like Judge Kozinski, acknowledges that readers do not assume absolute fidelity to the original: at least grammatical and syntactical changes are understood to be incorporated in any lengthy quote, and certainly readers expect changes for other reasons as well. Pet. Br. 18; Pet. App. A74 (discussing elimination of repetition, digressions, false starts, for example). The changes that readers might expect to have been made in a subject's words surely vary from publication to publication and from context to context.

In the present context, it would be surprising if readers of the articles in *The New Yorker* or of *In the Freud Archives* believed that they were reading a verbatim transcript. Anyone who has tried to tell a long story—or to give a closing argument to a jury—knows that few people can do so spontaneously with the coherence,

A proper focus on the understanding of a reader—rather than the form of the message—thus makes clear the illogic of any attempt to treat changes of words in quotations as a distinct category of libel law, separate and apart from other ways of recounting what a person said without "full direct quotation." *Time, Inc. v. Pape*, 401 U.S. 279, 286 (1970). Even in using quotations, a written work may be challenged as potentially injurious to reputation on the ground that it quotes particular sentences or phrases but not others, sets the quote in a particular context, quotes passages out of their original order, or eliminates words. *See* J. Hulteng, *supra*, at 72 ("In the boiling down, the selection of the key phrase or sentence, the reporter can do considerable violence to the theme of the original statement as the speaker intended it to be perceived.") Yet the law does not impose liability for such choices unless they create a different, defamatory meaning. There is no justification for creating and applying a different sort of analysis here: the substance of the allegedly false attribute ascribed to the plaintiff must be determinative.[28]

Petitioner, in fact, really seeks to have it both ways: when the words are different, he complains about the

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orderliness, lack of repetition, pacing, clarity, and careful phrasing that is found in written pieces like the book at issue in this case. Indeed, few if any speakers would even try to tell such a long story in an extended one-on-one conversation in just the way that they would write the story: many virtues of good writing would produce stultifying conversation.

[28] Although Judge Kozinski suggests a more elaborate analysis than does petitioner (Pet. App. A69-A88), it suffers from the same basic flaw: it concentrates on differences in words rather than differences in meaning. Thus, for example, although Judge Kozinski would require that any inaccuracies be "material," his explanation of "materiality" is largely concerned with whether the changes were merely "cosmetic" or made to "clean up peripheral aspects" of the speech at issue, not with whether they changed the meaning in a manner that would constitute falsity under the governing substantive law.

words; when the words are exact, he complains about the meaning. That is the teaching of his challenge to the quotation, "he had the wrong man." Pet. Br. 13; *see* pages 36-38, *infra* (discussing this quote in detail). He does not, and could not, claim that this quotation contains any words that he did not speak, only that he was not quoted in full. J.A. 215-16. Accordingly, petitioner does not challenge the rendition of the words themselves, but argues that editing of the passage effected a material change of meaning. For exactly the same reasons, however, he should be required to show a change of meaning (and knowledge or strong suspicion of that change) in challenging the remaining quotes as defamatory falsehoods.[29]

Petitioner also seeks to cut and trim his own theory, in essence creating specific exceptions to his general exception to the usual concept of knowing falsity. Thus, petitioner eventually acknowledges, as does the dissent in the court of appeals, that there may be knowing changes in quotations that do *not* necessarily result in knowing falsity.[30] But these obviously correct concessions are wholly incompatible with petitioner's main submission to this Court: that it is word change rather than alteration of meaning that is decisive, *i.e.*, that the ascription by quotation of any word not uttered is false and, if done knowingly, constitutes actual malice. Moreover, the principle behind the concessions cannot reasonably be limited by reference to the *purpose* of a particular

[29] Petitioner does not suggest that use of an ellipsis would have eliminated his complaint. In any event, although an ellipsis signals that material has been omitted, the signal would not immunize the passage if the omission changed the meaning in a defamatory way. Perhaps for that reason, it is in fact a common practice to omit ellipses in many forms of journalism. J. Hulteng, *supra*, at 73.

[30] Petitioner refers only to changes to correct errors of "grammar or syntax." Pet. Br. 18. Judge Kozinski, in his dissenting opinion, rightly referred to a wider range of changes that cannot support a finding of falsity. Pet. App. A74.

alteration: the purpose of a word change or addition—to improve grammar, syntax, or usage, to eliminate false starts and repetition, to add transitions, to put in words what was expressed by a nod responding to the interviewer's question—is quite irrelevant to the issue of falsity in libel law. It is only the impact on readers' understanding that matters, and it is therefore only the meaning of the quoted statement that bears on the question of injurious falsehood.

2. *The Need for Breathing Space.* The policies underlying the First Amendment requirement of actual malice apply as fully to quotations as to other types of statements. The basis of that protection in cases involving public figures like petitioner, who have entered the public arena and who may readily disseminate their own thoughts, is that freedom of the press—and therefore the dissemination of information and ideas—would be substantially impaired if authors and publishers curbed their writings out of fear of liability for statements that turn out to be false but whose falsity was not known or strongly suspected upon publication. *See, e.g., Gertz*, 418 U.S. at 340. The same harm to that core First Amendment interest would result if authors and publishers were held liable for departures from verbatim transcription without a known or suspected change of defamatory meaning. With quotations as with other statements, the First Amendment demands "breathing space" for journalism. *See Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. at 2695; *Gertz*, 418 U.S. at 342.

This Court, in fact, has expressly recognized the need for breathing space in recounting the statements of others, with specific reference to quotations (albeit not word changes). *Time, Inc. v. Pape, supra.* In *Pape*, the Court noted that the task of recounting what people say "presents rather complicated problems. A press report of what someone has said about an underlying event of news value can contain an almost infinite variety of

shadings. . . . Any departure from full direct quotation of the words of the source, with all its qualifying language, inevitably confronts the publisher with a set of choices." 401 U.S. at 286. The Court concluded that knowing or reckless falsity could not be found where Time, Inc., in making these choices of presentation, had adopted "one of a number of possible rational interpretations of a document that bristled with ambiguities." *Id.* at 290.

The breathing space provided by the actual malice standard is no less important for direct quotations, which, as noted above, are but one way of recounting what people say. There is no dispute that journalists may and do—indeed in many circumstances must—make changes in quotations. People typically do not speak in printable form, and they rarely do so at great length. *See* G. Hough, *supra*, at 271 ("The average person does not speak in complete sentences nor in direct and concise language."). Changes for publication are therefore routinely made to benefit the subject—to prevent him from looking foolish or unintelligent. J. Olen, *supra*, at 100 ("Not to clean up quotes is to make intelligent speakers look stupid and stupid speakers look stupider."). More important, changes are made to benefit the reader. A verbatim transcript—here, running 1,056 pages and covering conversations that took place over more than 40 hours—could not and would not be read. Word changes and additions, like selection of quotations, editing, and placement, are essential to produce a readable text.[31]

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[31] As Judge Kozinski noted below: "the way most people talk is not particularly suitable for publication. There are many fragments and other grammatical abuses; the speaker will often say 'uh' and 'ah' and 'you know'; occasionally he will make a false start and go back and correct himself; he may introduce irrelevancies and go off on tangents. A conscientious reporter will try to fix some of these problems, both to make a more readable story and keep the speaker from looking foolish." Pet. App. A74.

Although petitioner (like Judge Kozinski) has tried to identify and isolate the acceptable grounds for modifications (Pet. Br. 18; Pet. App. A74), the effort is bootless: there can be no artificially defined list of permissible changes for writers, depending on a particular form or on a particular purpose or anything else. The only intelligible principle is one based on the common legitimate journalistic aim of improving communication without introducing material factual inaccuracy. Readers of publications are helped, and subjects of interviews well served, by journalistic efforts to "clean up" quotations without materially altering their meaning.[32] Indeed, changes that make a story more readable affirmatively serve the First Amendment value of promoting dissemination of information and ideas, attracting and retaining more interested readers. *See* M. Charnley & B. Charnley, *supra*, at 248 ("a story written word-for-word 'contains a lot of the verbiage, bypasses, and repetitious figures of speech with which most of us adorn our spoken words. No man can impugn its accuracy; the question is, will anybody except the hero of the speech read it?' "). That benefit would be lost if penalties attached to any changes resulting from journalistic efforts to serve the reader while preserving meaning.

It is true, of course, that authors could refrain from quoting at all or as much, resorting (as petitioner suggests) to paraphrasing the statements instead. But that cure—which, as we have said, would make no real difference to any interest in protecting reputation—would have serious side effects on the uninhibited presentation of ideas

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[32] One group of *amici curiae* supporting petitioner expressly agrees that liability should not attach to many changes in quotations, putting forth a standard that, in our view, should apply to *all* changes in quotations: "Reporters are at risk only if their 'clean-up' actually distorts the speaker's *meaning* in a defamatory way, and even then the distortion must reflect actual malice." Brief *Amicus Curiae* of Certain Journalists and Academics 13-14 n.4 (emphasis added).

and opinions. A story that substitutes paraphrases for quotations is often a less readable story: quotations add significantly to a story's immediacy and pacing and to readers' comprehension. J. Stovall, *Writing for the Mass Media* 110 (2d ed. 1990). Yet the result of a reduced First Amendment protection for quotations—grounded in the notion of a "falsity of words" advanced by petitioner—would be a persistent disincentive to use quotes in many circumstances, for spoken words are often unusable in their original form. This sort of pressure to avoid quotation would exact a serious, and wholly unnecessary, toll on First Amendment values.

II. SUMMARY JUDGMENT WAS PROPER IN THIS CASE BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE ACTUAL MALICE WITH CONVINCING CLARITY.

A public figure like petitioner must, to establish actual malice, prove the defendants' subjective awareness of defamatory falsity with "convincing clarity." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. at 511 & n.30. That heightened standard of proof requires "clear and convincing evidence" that the truth was in fact seriously doubted before the courts can "strip the utterance of First Amendment protection." *Ibid.* For the reasons discussed above, in a case involving alleged misquotations, the plaintiff must show a change of defamatory meaning known or strongly suspected by the defendants upon publication. If the plaintiff cannot come forward before trial with "affirmative," "concrete" evidence sufficient to meet that high standard, summary judgment must be entered against him. *Anderson v. Liberty Lobby*, 477 U.S. at 256-57.[33]

[33] This Court has not spoken on whether, in a public figure libel case, falsity itself must be proved by clear and convincing evidence. The lower courts have divided on the question. *See Harte-Hanks*, 109 S. Ct. at 2682 n.2. We think that such proof should be required because it is hard to see how a factfinder could find awareness or

Both courts below correctly recognized that petitioner cannot meet this burden. Even if the field of inquiry is restricted to the recorded conversations—and the notes taken by Malcolm are not considered [34]—petitioner cannot

knowledge of falsity with convincing clarity while being only marginally persuaded of the falsity itself. In our view, however, that question need not be reached in this case.

[34] Of course, Malcolm's notes from petitioner's May 1983 four-day visit with her and her husband in New York (J.A. 112-15), which are disputed by petitioner, positively confirm not only that petitioner's meaning was not altered but that petitioner uttered exactly the contested words of three of the quotes at issue—the "intellectual gigolo" quote, the "sex, women, fun" quote, and the "greatest analyst" quote. Although the courts below put those notes aside, correctly concluding that summary judgment was required even without reference to them, it would have been proper for the courts below to rely on those notes. Petitioner, we think, could not establish their lack of authenticity, much less by the required clear and convincing evidence.

Whether petitioner can meet his burden depends not only on his own evidence but on the weight of that evidence relative to respondents' evidence. With respect to the notes, petitioner's current evidence consists of (a) his vehement denial that he uttered the quoted words and, in a very carefully worded statement, his denial that he "ever held such a conversation with Malcolm" when he visited New York in May 1983 (Pet. Br. 4 & n.1); (b) the unelaborated deposition testimony of William Shawn, editor of *The New Yorker* in 1983, that Malcolm told him that all of the quotes in the article came from the tapes (J.A. 223-24); and (c) a letter Malcolm dictated over the telephone to *The New York Times* (J.A. 222-23). The evidence to the contrary is that (a) the *Times* letter by its terms does not in fact say that all of the quotes were taken from the tapes; (b) Malcolm attests to the authenticity of the notes (J.A. 52); (c) Malcolm denies that she ever told anyone that all of the quotes came solely from the tapes (J.A. 83); (d) a letter petitioner wrote to Malcolm immediately after the May 1983 visit refers back to his discussions with Malcolm during the visit and shows that they did in fact discuss some of the subjects reported in the notes (J.A. 240-41); (e) the notes were turned over to respondents' counsel in December 1984, 19 months before petitioner had ever complained about the "intellectual gigolo" quote, yet that quote appears in the notes verbatim (J.A. 112, 115); (f) it is overwhelmingly implausible that petitioner did not discuss the subjects

prove that any of the challenged quotations are materially false in meaning. Still less can he prove by clear and convincing evidence that respondents, at the time of publication, knew of any discrepancies in defamatory meaning or seriously doubted that the published quotes accurately preserved the substance of what petitioner said.

A. Petitioner Must Show a Reasonably Evident Difference in Defamatory Meaning in Order To Demonstrate By Clear and Convincing Evidence That Respondents Recognized That There Might Be Such a Difference and Then Disregarded It.

Although proof of actual malice naturally takes account of proof of falsity, *see Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. at 778, proof of falsity is not itself proof of actual malice. *Harte-Hanks*, 109 S. Ct. at 2692-93; *Bose Corp.*, 466 U.S. at 511. Even if petitioner could show a material difference in meaning with respect to any of the quotations, he would still have to show that, at the time of publication, the respondents were actually aware of or strongly suspected such falsity, taking into account the numerous reasons why such awareness might not be present. As applied to alleged misquotations, this requirement means convincingly clear proof—giving due regard to all of the reasons that a journalist might legitimately select or alter quotes to produce a readable, coherent, clear story—that the author or publisher was actually aware that the choices of words might produce material changes of meaning.

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written about in her book (J.A. 65) during his four-day stay in New York to meet with his publisher; and (g) there is nothing about the notes themselves that could support an inference of lack of authenticity—in particular, nothing in them is out of step with the substance and tone of petitioner's statements on the tapes.

If all of this evidence is considered as a whole, petitioner has not made out a case of actual malice with convincing clarity. All that petitioner could add at trial would be his own credibility. That, we think, would not be enough to meet his burden.

To put this inquiry into context, it is important to note that petitioner has produced no direct evidence—for example, memoranda or statements by respondents—indicating that any of the respondents knew or suspected that the challenged quotations departed in meaning from his spoken words. Pet. App. B6 ("No direct evidence of actual malice exists.").[35] Nor has he produced any circumstantial evidence of the sort, for example, that this Court relied upon in upholding a finding of actual malice in *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. at 2693-94.[36] Petitioner's claim of actual malice

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[35] Petitioner seeks to use Malcolm's notes to support his own case, arguing that if he could prove that Malcolm's testimony about their authenticity should be disbelieved, such proof would be affirmative evidence of actual malice. Pet. Br. 46. He also suggests that the editorial changes in the manuscript, and a sentence of testimony by the former editor of *The New Yorker*, support his claim of actual malice. Pet. Br. 45-46. But none of that is particularly probative, let alone clear and convincing evidence, of actual awareness that *meaning* was altered on publication where, as here, no reasonably apparent material difference in meaning can be shown. The bare accusation that notes have been "fabricated" or that attributed quotations are inaccurate, which could be made in virtually any case, cannot be regarded as sufficient to defeat a summary judgment motion without impairing the "breathing space" recognized by this Court as essential to the operation of a free press. We also note that this Court said in *Bose Corp.*, 466 U.S. at 512: "Normally . . . discredited testimony is not considered a sufficient basis for drawing a contrary conclusion." Even less would it be sufficient to support a finding of actual malice with convincing clarity.

[36] Petitioner's evidence of actual malice is, in fact, remarkably sparse when contrasted to the evidence that this Court found sufficient in *Harte-Hanks*: the defendant newspaper was politically motivated to injure the plaintiff, a candidate for office in an imminent election; the defendant refused to interview the one witness who could confirm or deny the allegation, although it interviewed many others; numerous other witnesses to the disputed event, some of them explicitly believed by the defendant's staff, denied the allegation; the defendant refused to listen to a critical tape recording, although it knew the tape was crucial and it purported to be actively considering whether or not to endorse the plaintiff; the defendant ran a story setting the stage for the defamation even before interviewing

thus stands or falls with differences in the words themselves. But, to support a finding of actual malice, it would not be enough for differences—if there were differences—to be subtle or hidden; rather, they would have to be reasonably apparent. As a matter of logic, it typically cannot be "convincingly clear" that the author recognized a material difference in meaning if that difference is not facially evident.[37]

As the courts below recognized, analysis of the significance of any differences is, as an initial matter, a judicial task. California law makes clear that, before a jury question can arise, the courts must examine the particular disputed passages and, construing them in the context of the entire work, determine what an average reader could reasonably interpret the challenged statements to mean. *See Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d at 261, 721 P.2d at 91, 228 Cal. Rptr. at 209-10; *Kilgore v. Younger*, 30 Cal. 3d at 777, 640 P.2d at 797, 180 Cal. Rptr. at 661; *Jennings v. Telegram-Tribune Co.*, 164 Cal.

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any of the relevant witnesses; and the defendant's witnesses gave contradictory testimony on whether an investigation was undertaken. 109 S. Ct. at 2693-94.

[37] In *Bose Corp.*, for example, the Court recognized that a finding of actual malice could not rest on the obscure difference between sound wandering "about the room" and sound wandering "along the wall." 466 U.S. at 511-14. A requirement of obviousness of different meaning also undergirds the Court's holding in *Time Inc. v. Pape* that selection of one reasonable interpretation of an ambiguous statement could not support a finding of knowing or reckless falsity. 401 U.S. at 290. And on several occasions the Court has expressly referred to the presence of some kind of obvious departure from truth—as applied here, from the meaning of the original words—as a basis of liability. *See Harte-Hanks*, 109 S. Ct. at 2696 (recklessness can be found where there are "'obvious reasons to doubt the veracity of the informant or the accuracy of his reports'") (quoting *St. Amant v. Thompson*, 390 U.S. at 732); *Gertz*, 418 U.S. at 348 (minimal fault requirement in private figure case permissible at least if "the substance of the defamatory statement 'makes substantial danger to reputation apparent'") (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967)).

App. 3d at 126-27, 210 Cal. Rptr. at 488-89 ("A publication is not responsible for every strained interpretation a plaintiff might put on its words.") (internal quotations omitted); *see Forsher v. Bugliosi*, 26 Cal. 3d 792, 805-06, 608 P.2d 716, 723, 163 Cal. Rptr. 628, 635 (1980). Moreover, in applying constitutional standards, this Court has followed a similar course, determining how the allegedly defamatory material would reasonably be interpreted. *See Milkovich*, 110 S. Ct. at 2704-07; *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 13 (1970); *Letter Carriers v. Austin*, 418 U.S. 264, 284-85 (1974). Performing that task, the courts below concluded that petitioner was unable to show that material differences in defamatory meaning were so obvious from any claimed departures from verbatim transcription that a jury could infer respondents' knowing or reckless disregard of such differences.

B. Petitioner Has Not Shown Actual Malice With Respect to Any of the Challenged Quotations.

We review each of the six challenged quotes below. Even if there were differences in meaning between the quotations and passages in the tape transcripts—a proposition that we dispute—there are certainly no differences apparent enough to support a finding, by clear and convincing evidence, that respondents must have understood any differences in words to have altered meaning in a defamatory way.[38] This is particularly so when considered in light of

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[38] The inquiry is not made in a vacuum; rather it must be made with the knowledge of the writing process here: respondent Malcolm listened to and took notes from the tapes, then typed up those notes (along with notes from untaped conversations), and wrote the articles based on those notes; and at each stage—in the initial note-taking, the typing, and the drafting—she "cleaned up" the quotations for use in a coherent and readable story. *See* J.A. 83, 52, 116. (There was no transcript of the 40-50 hours of tapes until this litigation commenced.)

Malcolm's attestation that she understood petitioner to have made precisely the challenged statements or their equivalents in meaning. *E.g.*, J.A. 60, 116-22. For this and other reasons, none of the challenged quotes is actionable.

1. "*Wrong Man.*" Petitioner challenges one quote on the ground that his meaning was distorted by Malcolm's selection of his words from the tape transcript, not by any asserted attribution to him of words he did not utter. The book describes Dr. Eissler's pressing of petitioner to keep silent about his firing so as, in petitioner's words, not "'"to poison Anna Freud's last days."'" J.A. 215. Petitioner resisted. The book quotes petitioner describing the conversation as follows:

> "[Masson:] 'What have I done? *You're* doing it. *You're* firing me. What am I supposed to do—be grateful to you?' [Eissler:] 'You could be silent about it. You could swallow it. I know it is painful for you. But you could just live with it in silence.' [Masson:] 'Why should I do that?' [Eissler:] 'Because it is the honorable thing to do.'"

J.A. 215. Masson is quoted as then saying to Malcolm: "'Well, he had the wrong man.'"

Petitioner complains that the quotation has him confessing to being dishonorable. Pet. Br. 39. Quite simply, that is not a reasonable reading of the passage. Rather, the evident meaning is an entirely nondefamatory one—that petitioner did not view keeping silent as an honorable course of action. A major theme of petitioner's lengthy remarks throughout the book—indeed, the premise of his giving more than 40 hours' worth of interviews on the subject—was precisely that he disagreed with the psychoanalytic establishment's penchant for secrecy.[10] An aver-

[10] For example, immediately before the "wrong man" quote, the book reports that petitioner decided that he could not and would not remain silent about the meeting at which he was fired, notwithstanding an initial promise to do so. *In the Freud Archives* at 67. The book also reports that petitioner challenged his firing from the Freud Archives, in a lawsuit, partly on the ground that the firing was designed to cover up the truth. *Id* at 140-41. In addition, the book notes that petitioner refused a substantial offer of severance pay from the Archives, saying, "'I thought it was hush money.'" *Id.* at 148.

Petitioner's opposition to secrecy in the psychoanalytic world is also a major theme of his new book, *Final Analysis* (1990). *See id.* at 1-4; *see also id.* at 183 (likening such secrecy to government secrecy).

age reader of the articles or book must have understood that and so interpreted this passage. The alternative reading suggested by petitioner is so implausible that a reader could not reasonably have adopted it—that, although the book as a whole makes perfectly clear that petitioner firmly believed that he was right in refusing to keep silent, he really believed that he was acting dishonorably in speaking openly and publicly of his firing. It would require a strained reading to construe the challenged passage as containing such an unlikely and out-of-character confession. *Jennings*, 164 Cal. App. 3d at 127, 210 Cal. Rptr. at 489 ("'A publication is not responsible for every strained interpretation a plaintiff might put on its words.'") (citations omitted).

We also think that the quote conveys no message not contained in the tape excerpt from which it was taken. Petitioner recounted his conversation with Eissler:

> I said, "What have I, what have I done? *You* did it. You fired me. What am I supposed to do: thank you? be grateful to you?["] He said, "Well, you could never talk about it. You could be silent about it. You could swallow it. I know it's painful for you but just live with it in silence." "Fuck you," I said, "Why should I do that? Why? You know, why should one do that?" "Because it's the honorable thing to do and you will save face. And who knows? If you never speak about it and you quietly and

> humbly accept our judgment, who knows that in a few years if we don't bring you back?" Well, he had the wrong man. Really, I mean, that's just not, not for me.

J.A. 215-16. Malcolm has attested that she did not believe she was altering the meaning when she selected a portion of this passage for inclusion in her book. J.A. 52. The differences between the tape version and the published version cannot establish the contrary.

Finally, at most, the excerpting of petitioner's account of and comment about his conversation with Eissler amounted to selection of one rational interpretation of an ambiguous statement. That is enough to defeat liability under *Time, Inc. v. Pape*, 401 U.S. at 290. There, this Court found no actual malice in the selective presentation of quoted statements, applying precisely that standard.

2. *"Intellectual Gigolo."* Petitioner challenges one phrase in a passage in which he first recounts a lover of his saying that "'"it's very nice sleeping with you in your room, but you're the kind of person who should never leave the room—you're just a social embarrassment anywhere else, though you do fine in your own room."'" Petitioner then goes on to say, "'And you know, in their way, if not in so many words, Eissler and Anna Freud told me the same thing. They liked me well enough "in my own room." They loved to hear from me what creeps and dolts analysts are. I was like an intellectual gigolo—you get your pleasure from him, but you don't take him out in public.'" J.A. 94. The passage concludes with petitioner reporting what he viewed as a private confession by Anna Freud that her father would not choose to become an analyst if he were alive today. *Ibid.* Petitioner complains that he did not use the phrase "intellectual gigolo" and that its appearance in the quote conveys the false and defamatory message that his "intellect was for sale" and that he "had been willing to be dishonest about the views

he purportedly held in his scholarship and intellectual activities" for personal gain. J.A. 14.

The first flaw in petitioner's contention is that this passage is no longer properly in the case. The court of appeals held that, even aside from the question of actual malice, the passage was not actionable under state law. Thus, in one of its alternative rulings rejecting this particular claim, the court held that the passage "is not defamatory." Pet. App. A15. Petitioner did not challenge that ruling in his petition. Indeed, he could hardly have done so, because the holding that the statement was not so injurious as to constitute defamation could only have been a matter of state law.[40] The court of appeals also held that the passage was not actionable because it caused no incremental harm to his reputation beyond that inflicted by the "nonactionable remainder of the publication." Pet. App. A15-A16. That ruling too—described by the court of appeals itself as a conclusion that the statement is "nondefamatory" for that reason as well (Pet. App. A15) and having nothing to do with the federal requirement of actual malice—is most sensibly understood as involving only a question of state law.[41]

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[40] Moreover, petitioner is hardly in a position to dispute the finding that the phrase is not defamatory, as he did not think to complain of the quote until his fourth amended complaint, which was filed almost two years after his original complaint and only after petitioner had reviewed the tape transcripts and determined that the phrase did not appear there. It is hard to imagine why, if petitioner found the phrase defamatory, he failed to challenge it for so long—unless, of course, petitioner knew that he had actually used the phrase in New York, as reflected in Malcolm's notes.

[41] California case law appears to support the concept of incremental harm. *See Reader's Digest*, 37 Cal. 3d at 266, 690 P.2d at 624-25, 208 Cal. Rptr. at 151-52. Certainly petitioner has not argued or shown the contrary. Even if California law were otherwise, however, we think that the First Amendment would itself bar imposition of liability for speech that causes no incremental harm to reputation. *See* pages 19-23, *supra*.

In any event, there can be no proof that the challenged phrase conveyed to a reasonable reader a different meaning from that conveyed by petitioner's words on tape, let alone convincingly clear proof that respondents were aware of this different alleged meaning—*i.e.*, that petitioner tailored his thoughts to fit the tastes of his benefactors. The passage as a whole was drawn from several portions of petitioner's remarks on tape: petitioner reports his lover's remarks about his being a private pleasure but a public embarrassment (J.A. 95), explicitly agrees with Malcolm's analogy to Kurt Eissler's and Anna Freud's view of him (J.A. 95-96), describes how "charmed" Eissler and Freud were in private by his "irrepressible" manner (J.A. 97, 99), and reports Anna Freud's private remark about her father not being an analyst today, stressing that "she would never, ever say that in public" (J.A. 100-01). Petitioner's challenge, then, rests on the contention that, despite the accuracy of the context, use of the phrase "intellectual gigolo," standing alone, so clearly could convey the alleged defamatory meaning to a reasonable reader that Malcolm must have recognized it but employed the phrase nevertheless. That argument, we submit, is wholly implausible.

Even if the phrase had been invented by Malcolm—which it was not, as Malcolm attests (J.A. 53, 118) and her notes make clear (J.A. 115)—addition of the phrase did not alter the meaning reasonably conveyed, let alone do so in an evident manner. The phrase, "intellectual gigolo," of course, does not stand alone; it is immediately followed by a dash and clause explaining precisely what meaning is intended—that petitioner gave Eissler and Freud intellectual pleasure in private but could not be acknowledged in public. The particulars of the remainder of the quote also make clear that the explanation following the dash is the meaning both intended and reasonably understood. Petitioner's alternative reading, moreover, would be deeply inconsistent with what a reader would

reasonably understand from the rest of the book—that, far from selling himself out intellectually, petitioner was steadfastly and indeed passionately committed to his views; and that Eissler and Freud were charmed by him, not because he altered his views to fit theirs, but because they enjoyed his brashness and boldness and because at least Eissler enjoyed flirting with his unorthodox ideas. *See, e.g., In the Freud Archives* at 20-21, 28-29, 90, 150-51. The only reasonable reading of the challenged phrase, therefore, is that petitioner was, to Eissler and Freud, a purely private pleasure—a meaning that accurately conveys what petitioner himself said repeatedly on tape.[42] Petitioner has not demonstrated that respondents had any different understanding.

3. *"Sex, Women, Fun."* Petitioner challenges the quotation of him saying that, if he had been allowed to take over the Freud house in England, it "would have been a center of scholarship, but it would also have been a place of sex, women, fun." J.A. 126. This quote, however, was twice found by the district court to be substantially true (Pet. App. B22-B23, C7-C8), and the court of appeals evidently agreed with that holding (Pet. App. A17-A18). The holding of substantial truth is one of state law and is unchallenged in the petition; thus, there is no reason for this Court to address the issue of actual malice.

In any event, actual malice could not be established, because, as the holding of substantial truth would compel,

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[42] Petitioner incorrectly alleges that the court of appeals resolved against him the factual issue whether he ever used the words "intellectual gigolo." Pet. Br. 41-42. All that the court of appeals did was to observe in a footnote that petitioner's vehement denial that he used the phrase was insufficient to establish actual malice by clear and convincing evidence, because petitioner "indisputably made numerous statements which were the substantive equivalent of the 'intellectual gigolo' quote." Pet. App. A13 n4. In fact, the court of appeals explicitly stated its assumption that "it may be true that Masson did not use the words 'intellectual gigolo.'" Pet. App. A15.

there is no noticeable discrepancy of meaning between the quote and what petitioner admittedly said. In addition to recounting his general promiscuity and his "always" having brought along mistresses on his visits with Eissler (*e.g.*, J.A. 128-30), petitioner said, in particular, when describing his relationship with a London psychoanalyst: "'[H]e's fun. I like him. . . . [I]t was buddy-buddy, and we were to stay with each other and [laughs] we were going to pass women on to each other, and we were going to have a great time together when I lived in the Freud house. We'd have great parties there and we were [laughs] . . . going to really, we were going to live it up.'" J.A. 129.[43] Petitioner could not establish a change of meaning from his own statements, let alone a knowing change of meaning.

4. *"I Don't Know Why I Put It In."* Petitioner further complains of a quotation contained in a passage that begins with Malcolm noting her own ponderings about what led petitioner so dramatically and suddenly to alter his stance toward psychoanalysis—to change, between the time of the New Haven paper and the time of the conversation with Malcolm, from "a Freudian psychoanalyst with somewhat outré views into the bitter and belligerent anti-Freudian he had become." J.A. 175. The passage notes that the tone of the New Haven paper was, for the most part, scholarly, quiet, sober, tedious in places, and "respectful of psychoanalysis and of Freud." *Ibid.* The passage then says that Malcolm told petitioner of her perception of the change and asked him for an explanation, continuing:

> Masson sidestepped my question. "You're right, there was nothing disrespectful of analysis in that paper,"

[43] Petitioner is apparently referring to this quotation when he admits to saying that he and another analyst "would introduce women to each other." Pet. Br. 9. This change in description—from "pass[ing] women on to each other" to "introduc[ing] women to each other"—shows quite well how a paraphrase may distort meaning. *See* pages 23-27, *supra*.

> he said. "That remark about the sterility of psychoanalysis was something I tacked on at the last minute, and it was totally gratuitous. I don't know why I put it in. The paper was very scholarly, and I thought analysts would be fascinated by my discoveries and would receive them with great warmth. But something causes analysts to ignore my material and to focus on me."

Petitioner challenges one piece of the quotation, "'I don't know why I put it in.'" Pet. Br. 39-40.

Even if petitioner did not speak the exact words quoted—and Malcolm testified that Masson had done so in one of their unrecorded conversations (J.A. 179)—the challenged part of the quotation does not materially differ in meaning from petitioner's acknowledged statements. In the taped interviews, petitioner agreed that the New Haven paper, but for the last sentence asserting the sterility of psychoanalysis, was "still well within the analytic tradition" and "really not a deep criticism of Freud," and he described the final sentence as "an in, [sic] possibly, gratuitously offensive way to end a paper to a group of analysts." J.A. 176. (Petitioner also said in a letter to the Board of Directors of the Freud Archives that the remark "was unfortunate, and poorly worded." J.A. 177-78.) These statements convey what Malcolm (correctly) understood the disputed quotation to convey—that petitioner's inclusion of the remark about sterility in the otherwise respectful paper "was an impulsive decision." J.A. 180.

Petitioner's only response is that the quotation conveys a false meaning because he told Malcolm that he made the remark because he thought it true. Pet. Br. 11. But that is not responsive to the question addressed by the passage and the quotation—why, believing the sterility remark, petitioner chose that particular occasion to make it, since it was offensive to his audience and out of keeping with the tone of the paper as a whole. There is simply no reason to doubt that Malcolm (correctly) understood petitioner not to have an adequate answer to

that question. Accordingly, there could be no proof that she believed the challenged quote to be anything but perfectly faithful to petitioner's meaning."

5. *"It Sounded Better."* Petitioner seeks to recover for the quote in which, after explaining that his grandfather had changed the family name of Moussaieff to Masson in the 1920s, he says: " 'My parents named me Jeffrey Lloyd Masson, but in 1975 I decided to change my middle name to Moussaieff—it sounded better.' " J.A. 87. On tape, petitioner had said: "I changed my middle name. I didn't like it." J.A. 87. When asked why, he said: "I just liked it. . . . You know, it was sort of part of analysis: a return to the roots, and your family tradition and so on." J.A. 89. Malcolm testified that she perceived no difference in meaning between the quote in the book

" Petitioner has dropped his challenge to the book's statement that he "sidestepped" Malcolm's question. That challenge, of course, does not involve misquotation. And the statement was, in any event, Malcolm's view, well-supported by the tapes, that petitioner never did explain to her satisfaction why his particular discoveries and his disagreements with received psychoanalytic learning led him to become such a radical anti-Freudian, when at least initially he expressed some of those views well within the tradition.

We note, in addition, that it is by no means clear what damaging message petitioner believes the quotation falsely to convey. Petitioner's brief suggests only that the quote made it appear that he "thoughtlessly" included the statement, but that is in essence what petitioner said on tape. In his complaint, petitioner said that the entire passage portrays him as "an unprincipled person with no ability or scholarship to back up his positions on Freud, when in truth and in fact MASSON repeatedly gave MALCOLM reasoned explanations for those views, which explanations MALCOLM expressed." J.A. 15. That statement, aside from focusing chiefly on Malcolm's own words rather than on the quotation, carries with it its own refutation, for the remainder of the book elaborately explains the basis for petitioner's positions on Freud. Against that background, the present passage could only be read to indicate, not petitioner's lack of principle or scholarship, but the lack of a satisfactory psychological self-explanation for his overall ideological transformation based on his limited historical findings. It is hard to see how that suggestion is either false or defamatory.

and petitioner's tape-recorded remarks. J.A. 92. If there is any difference between "it sounded better" and "I just liked it," it is hardly sufficient to show clearly and convincingly that Malcolm believed that a reader of the latter would have a different (and more negative) understanding of Masson than would a reader of the quote as it appeared in the book. Moreover, it is clear from the immediately preceding sentence in the article that petitioner did not pick the name "Moussaieff" randomly, but took on a family name, and thus the passage accurately conveyed the idea that he was acknowledging his family and his roots.

6. *"Greatest Analyst."* Finally, petitioner challenges the quote in which, in a telephone call made to Malcolm just after his book was accepted for publication, petitioner boasts that eventually analysts will view him, "after Freud, [as] the greatest analyst who ever lived." J.A. 135. (Petitioner again made such a statement during his May 1983 visit to New York to promote his book, as reflected in Malcolm's notes of that visit. J.A. 112-13, 135-36.) The gist of petitioner's complaint is that the quote would make a reader believe that petitioner had a grandiose, egotistical, arrogant conception of his place in the history of psychoanalysis. *See* Pet. Br. 40; J.A. 16.

That same meaning, however, is reasonably drawn from many statements of petitioner recorded on tape. For example, petitioner said: "for better or worse[,] analysis stands or falls with me now" (J.A. 137); "I hold a position that no other analyst holds, including, alas, Freud. At first I thought: Okay, it's me and Freud against the rest of the analytic world, or me and Freud and Anna Freud and Kur [sic] Eissler and [certain others] against the rest of the world. Not so, it's me. It's me alone." (J.A. 139); and "Analysis was started in 1895 and . . . it died in 1982." (J.A. 140). He said that other analysts sensed that he was "a really critical danger [to psychoanalysis]. . . . [a]nd they were right. 'This man could singlehandedly bring down the whole business.' " J.A. 143. And

he predicted that when his book came out, "I really feel it spells the beginning of the end of psychoanalysis. . . . [Analysts will blame me] for having done psychoanalysis an irreparable damage. . . . I think that this book really is, uh, it's the end for them." J.A. 145.[45]

Petitioner contends that there is an important difference between what he admits saying on tape and how he is quoted in the book: he says that the former speaks only to his assessment of his work, not of himself. Pet. Br. 40.[46] (On tape, he agrees with Malcolm's assessment that his claims were "very grandiose" but says, "it's got nothing to do with me. It's got to do with the things I discovered." J.A. 137.) In this context, that is a distinction without a difference. Petitioner's place in the history of psychoanalysis could be based only on his discoveries (he is concededly not a practicing therapist, *see In the Freud Archives* at 30, 31), and there is no reason for Malcolm to have drawn any meaningful distinction between his assessment of his work and his assessment of his place in psychoanalysis. Certainly, in comparing the quote and what petitioner admittedly claimed about his work, one could not find a difference of substance that could, with convincing clarity, support an inference that the quote must have been used with awareness of a different (false and defamatory) meaning.

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[45] In his initial complaint, petitioner denied that he had ever said that "analysis stands or falls with me now" or that he "could single-handedly bring down the whole business." J.A. 260. He no longer contests the validity of those passages because they appear verbatim on the tapes. *See* page 4, *supra*.

[46] Although petitioner no longer mentions it in explaining his complaint (Pet. Br. 40), earlier in the case he complained specifically that the quote suggested on his part that eventually analysts would recognize his discoveries. That suggestion conveys no different defamatory meaning about petitioner's view of himself than the "greatest analyst" quote.

C. Petitioner Has Not Independently Shown Actual Malice on the Part of the Publishers.

If respondent Malcolm was entitled to summary judgment, then, as the court of appeals held, respondents The New Yorker Magazine, Inc., and Alfred Knopf, Inc., who published the articles and book, were likewise entitled to summary judgment. Pet. App. A30. Petitioner has not challenged that aspect of the court of appeals' holding. Indeed, the publishers could not be found to have published with knowing or reckless disregard of false meaning for the very same reasons that Malcolm could not be found to have written with such disregard. There was no more falsity of meaning, and no greater basis for knowing or suspecting such falsity, when the publishers examined the piece than when Malcolm wrote it.

In any event, the publishers would be entitled to summary judgment even if Malcolm were not. Petitioner must show actual malice as to each defendant to prevail. He could not make such a showing, certainly not by clear and convincing evidence.

Knopf, which had entered into a standard form of independent contractor publishing agreement with Malcolm, was entitled to rely on her as a known trustworthy writer whom it had published before.[47] Petitioner has put forth no evidence that could show that Knopf's reliance on Malcolm was overcome by some ground giving it knowledge or strong suspicion of falsity. Petitioner's only evidence is that Knopf editor-in-chief Robert Gottlieb heard about a complaint that Masson's counsel made to The New Yorker, but he does not point to any par-

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[47] *See Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1089 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985); *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 959 (D.D.C. 1976); *Reader's Digest Ass'n v. Marin County Superior Court*, 37 Cal. 3d at 259, 690 P.2d at 619, 208 Cal. Rptr. at 146; *Weiner v. Doubleday & Co.*, 74 N.Y.2d 586, 595-96, 550 N.Y.S.2d 251, 255 (1989), *cert. denied*, 110 S. Ct. 2168 (1990).

ticulars of the complaint that must have engendered doubts in Knopf about the meaning of the quotations now being challenged. Pet. Br. 14.[48] A general complaint (in this case, not even to Knopf) does not give rise to a duty to conduct an independent investigation, much less establish actual malice. *See Liberty Lobby, Inc. v. Anderson*, 746 F.2d at 1569; *Reader's Digest Ass'n v. Marin County Superior Court*, 37 Cal. 3d at 260, 690 P.2d at 620, 208 Cal. Rptr. at 147.

As to respondent The New Yorker, petitioner has argued vicarious liability based on a supposed employment relationship between Malcolm and The New Yorker. But the evidence is clearly to the contrary, because Malcolm had no obligations to produce any work for The New Yorker and the magazine had no contract with her specifying the nature or frequency of her work. *See* J.A. 244-46. When she did write an article, Malcolm was obliged to give The New Yorker what amounts to a right of first refusal. There is, therefore, no ground for vicarious liability. *See* 2 B. Witkin, *Summary of California Law*, Agency and Employment § 15 at 31 (9th ed. 1987) ("the right of control . . . determines the issue of employment or independent contract relationship").

Nor is there a basis for a direct finding of actual malice on the part of the magazine. Like Knopf, The New Yorker was entitled to rely on Malcolm as a known trustworthy source: she had written pieces for the magazine for almost 20 years before 1983. J.A. 278-79. Against such reliance, petitioner weighs in only with his complaint to a fact-checker, who had called him, about

[48] Indeed, Masson testified about Gottlieb: "I suspect he believed Janet Malcolm. He probably asked her—after all, they see each other. . . . [C]ertainly I don't believe Mr. Gotlieb [sic], if he knew that they were false, would have gone ahead and published it. I think he was negligent in not finding out, but not dishonest." J.A. 248.

the accuracy of non-defamatory details unrelated to the quotes now at issue. Given that petitioner has not shown that he demonstrated any material inaccuracy to The New Yorker before publication, particularly with respect to the quotes later challenged, there is no sufficient evidence to conclude that The New Yorker published the piece with serious doubts about the truth of the statements challenged in this lawsuit.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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